Supreme Court, U. S.
FILED
AUG 29 1975
MICHAEL RODAK, JR., CLERK

No. 74-1542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNION ELECTRIC COMPANY, *Petitioner*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF AMICI CURIAE FOR APPALACHIAN POWER COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, KENTUCKY POWER COMPANY, and OHIO POWER COMPANY

H. EDWARD DUNKELBERGER, JR.
THEODORE L. GARRETT
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

Attorneys for Amici Curiae

Of Counsel:

A. JOSEPH DOWD
AMERICAN ELECTRIC POWER
SERVICE CORPORATION
2 Broadway
New York, New York 10004

August 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:

Appalachian Power Company v. Environmental Protection Agency, 477 F.2d 495 (4th Cir. 1973) 3
Buckeye Power Company v. Environmental Protection Agency, 481 F.2d 162, 165 (6th Cir. 1973) 4
Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir. 1972) 3
Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972) 5
Indiana & Michigan Electric Company v. Environmental Protection Agency, 509 F.2d 839, 845 (7th Cir. 1975) 4
St. Joe Minerals Corp. v. Environmental Protection Agency, 508 F.2d 743 (3d Cir. 1975)..... 3, 6, 7
U.S. Steel Corp. v. Fri, 364 F.Supp. 1013 (N.D. Ind. 1973) 5

STATUTES AND REGULATIONS:

Clean Air Act, As Amended

42 U.S.C. § 1857c-5(a)(2)(A)(i) 5
42 U.S.C. § 1857c-5(a)(3)(B) 5
42 U.S.C. § 1857c-5(d) 5
42 U.S.C. § 1857c-8 5
42 U.S.C. § 1857d-1 4
42 U.S.C. § 1857h-2 5

40 C.F.R. § 51.13(b)(2) 5

LEGISLATIVE MATERIAL:

H. Conf. Rep. 93-1085, 93d Cong., 2d Sess. 40 (1974).. 5

MISCELLANEOUS:

Federal Power Commission, Potential Effects of Air Quality Regulations on The Bulk Electric Power Supply (February, 1974) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1542

UNION ELECTRIC COMPANY, *Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF AMICI CURIAE FOR APPALACHIAN POWER COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, KENTUCKY POWER COMPANY, and OHIO POWER COMPANY

INTEREST OF AMICI CURIAE

Amici Appalachian Power Company, Indiana & Michigan Electric Company, Kentucky Power Company, and Ohio Power Company, are electric utilities

which rely predominantly on coal to fuel their existing generating units. Each of these companies is a part of the American Electric Power System, which is the largest investor-owned electric power system in the United States. Three of these companies were parties in the related Fourth and Seventh Circuit decisions discussed below. Counsel for petitioner and respondent have consented to the filing of this brief.

The need for federal and state regulations to improve the quality of our air is fully recognized, and their general objectives are supported by electric utilities. However, the electric utility industry faces complex and serious problems involving the cost, technology, and time for compliance with Clean Air Act requirements. Some of the evolving regulations, particularly those involving sulfur dioxide standards, not only have been developed without proper scientific evidence of need, but also fail to recognize the technological infeasibility and severe adverse economic and social impact of the standards. Thus, in February, 1974, the Federal Power Commission issued a report which concluded that the nation's electric power supply will be critically deficient if EPA continues to insist upon strict enforcement of existing air quality standards.[1]

Because a sensible balance must be achieved between the requirements of a healthy environment and all other aspects of the public interest, including the general economy, and for the reasons set forth below, we urge that this Court review the decision of the Court of Appeals.

---

[1] Federal Power Commission, Potential Effects of Air Quality Regulations on The Bulk Electric Power Supply (February, 1974).

REASONS FOR GRANTING THE WRIT

The granting of the petition for certiorari in this case is supported by several of the grounds that are traditionally deemed sufficient by this Court to warrant plenary review.

1. The five Courts of Appeals which have considered industry challenges to implementation plan approvals by EPA have announced sharply conflicting holdings on the questions of whether and when the issues of necessity, economic impact and technical feasibility may be raised by affected persons.

The Eighth Circuit, standing alone, has held that these issues need not be examined by EPA, and are not reviewable in a federal court. In contrast, the remaining four circuits have held that these issues must be considered by EPA at some point, and that EPA's action thereon is judicially reviewable. However, the four circuits have divided on the issue of when these factors should be considered by EPA.

The Third and Fourth Circuits have held that economic and technical factors must be considered by EPA in the implementation plan approval process. *St. Joe Minerals Corp.* v. *Environmental Protection Agency,* 508 F.2d 743, 747 (3d Cir. 1975); *Appalachian Power Company* v. *Environmental Protection Agency,* 477 F.2d 495, 505 (4th Cir. 1973). As the Court stated in *Duquesne Light Co.* v. *EPA,* 481 F.2d 1 (3d Cir. 1972),

> "The Court finds that to expose the companies to the risk of punishment without affording them a full occasion to express their objections to the state implementation plan is fundamentally unfair." (481 F.2d at 10)

In contrast, the decision below held that "Congress intended to preclude economic and technological factors from the Administrator's consideration of whether to approve an implementation plan." (515 F.2d at 215)

The two other Circuits which have considered the issue have agreed that technological feasibility and economic impact are factors which must be considered by EPA under the Clean Air Act, but held that these issues may be heard by EPA and by the Federal District Courts only in enforcement proceedings rather than at the approval stage. *Indiana & Michigan Electric Company* v. *Environmental Protection Agency,* 509 F.2d 839, 845 (7th Cir. 1975); *Buckeye Power Company* v. *Environmental Protection Agency,* 481 F.2d 162, 165 (6th Cir. 1973). These holdings are directly in conflict with the decision below, which held that no judicial review of such matters is permissible, since such technological and economic considerations "are not appropriate for a judicial resolution but are essentially legislative judgments as to where the public interest lies." (515 F.2d at 219). This rationale is totally at odds with fundamental concepts of reviewability, the Administrative Procedure Act, and decisions of this Court.

Thus, three different, conflicting interpretations of the statutory scheme have emerged from the foregoing decisions of the five Circuits. This conflict constitutes a substantial reason why certiorari should be granted.

2. The decision below is inconsistent with Congressional policy. EPA's position in the foregoing cases has been that under Section 116 of the Act[2] the states may adopt plans more stringent than necessary,

[2] 42 U.S.C. § 1857d-1.

and thus that EPA has a passive role in reviewing state plans. This interpretation flies in the face of the statute. For example, under Section 110(a)(2)(A)(i) of the Act, EPA must approve a plan which specifies a "reasonable time" for attainment of secondary standards, and the agency's own regulations include consideration of available technology in defining what is "reasonable."[3] Under the 1974 Amendments to the Act, EPA was expressly directed by Congress to review all state implementation plans to determine whether their requirements can be made less stringent without interfering with the national air quality standards.[4] Further, although Section 116 allows states to promulgate requirements more stringent than necessary, nothing in the Act authorizes such provisions to be approved by EPA and thereby to become part of the Federal implementation plan."[5] EPA's role cannot be overemphasized. Once approved by the Administrator, an implementation plan becomes a Federal requirement and may be civilly and criminally enforced by EPA under Section 113 of the Act and by private citizens under Section 304 of the Act.[6]

[3] 42 U.S.C. § 1857c-5(a)(2)(A)(i); see 40 C.F.R. § 51.13(b)(2). The latter regulations are binding on the states; we submit that EPA should examine whether the states have followed these provisions.

[4] 42 U.S.C. § 1857c-5(a)(3)(B). This provision expressly adopted to make clear Congress' policy by which "conversions to the burning of coal can be effectuated more readily," by electric power plants and other fuel burning stationary sources. H. Conf. Rep. 93-1085, 93d Cong., 2 Sess. 40 (1974).

[5] *See* 42 U.S.C. § 1857c-5(d) State standards become part of an "implementation plan" only when approved by EPA.

[6] 42 U.S.C. §§ 1857c-8, 1857h-2. *See* Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972); U.S. Steel Corp. v. Fri, 364 F.Supp. 1013 (N.D. Ind. 1973).

3. The decision below creates the unique situation that an agency of the Federal government must approve a state implementation plan and proceed to enforce it without ever having to justify its content. This construction of the Act means that any set of emission limits in a state implementation plan, no matter how arbitrary or unfounded they may be, must be approved by the EPA Administrator and complied with by affected industry sources.

The issue raised here cannot be left unresolved. If the EPA Administrator adopts the position of the decision below in other Circuits where this issue has not been decided, it will be possible for the Administrator simply to say that he does not know whether there is any justification for the requirements in a state implementation plan, but that it is the law, and is subject to Federal as well as state enforcement. Such a position does great disservice to the public, to those affected industries who seek to comply with the law, and to those who in good faith disagree. The decision below deprives affected industries of any opportunity to challenge the requirements in a state implementation plan which was developed without scientific evidence of need, or which is unrealistic in view of the timetables involved or the availability of pollution control technology.

The illogic of EPA's position is reflected in the facts of the *St. Joe Minerals* case, *supra.* There, after a remand to EPA by the Court of Appeals, the Administrator issued an explicit finding that the Pennsylvania emission limitation for sulfur oxides was not technologically feasible as applied to zinc smelters. However, the Administrator took the position that he did not have the power to disapprove a state implementation plan provision simply because it was technologically infeasible, despite the fact that Pennsylvania had adopted the standard in question without evaluating either its technical or economic feasibility or whether the standard was necessary in order to achieve ambiant air quality standards.

4. The decision below involves a question of continuing importance under the Clean Air Act which should be settled by this Court. In its response to the petition, EPA acknowledged that this Court should review this case and the decision of the Third Circuit in *St. Joe Minerals, supra,* No. 74-1650.[7] In its petition for certiorari in *St. Joe Minerals, supra,* (at 9-11) EPA asserts that the legal issues involved in these cases are still significant in that the agency will be taking further action to revise approved plans that have not in fact resulted in attainment of the national standards, will adopt national standards for additional pollutants or revised standards for those covered by existing standards, and will be considering variances and other revisions it reviews which would occasion further plan approvals.

CONCLUSION

The Administrator's construction of the Act, upheld by the Court below, means that any emission limitations or other requirements in a state implementation plan, no matter how irrational or unfounded they may be, may and must be mindlessly approved by the Administrator as Federal law, thus exposing affected sources to penalties under the Clean Air Act for vio-

---

[7] There is a suggestion by the parties that the *St. Joe Minerals* case may have become moot. If so, review of the decision below by this Court takes on added importance.

lations and to citizens suits in the Federal courts for enforcement of the regulations, without an opportunity for Federal judicial review of the validity of the requirements. This is an intolerable and illogical result which, we submit, was not intended by Congress in enacting the Clean Air Act, and which conflicts with the holdings of four Circuits which have considered the issue.

It is respectfully submitted that the decision below was erroneous on questions of great importance to the electric utility industry, and to other industries affected by state implementation plans. Review by this Court is essential.

Respectfully submitted,

H. EDWARD DUNKELBERGER, JR.
THEODORE L. GARRETT
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

Attorneys for Amici Curiae

Of Counsel:

A. JOSEPH DOWD
AMERICAN ELECTRIC POWER
SERVICE CORPORATION
2 Broadway
New York, New York 10004

August 1975